Attachment 4

SUMMARY OF STATE HAZARDOUS AIR POLLUTANT PROGRAMS

Introduction

Wisconsin is not the only state regulating air toxics beyond the limits required by the CAA. As part of an effort to identify other state air toxics program, the DNR conducted a survey and extensive background research on 26 states across the nation. Out of the 26 states contacted, 16 had programs stricter than the federal government's MACT program. 23 states have not been contacted yet. Out of the 23 not contacted, the DNR, according to available information and research, anticipates that at least 5 of the states have or are developing state only air toxics programs. In all, at least 16, and probably 21 or more states have air toxics programs stricter than the federal MACT program.

Research revealed wide variation in the size and structure of state only air toxics programs. Programs differ, sometimes substantially, on factors such as listing criteria, health based thresholds, regulatory strategies, timelines, agency discretion, and other policy and program characteristics. Despite the wide variation in state only air toxics programs, several distinct regulatory strategies emerged. A brief summary of observed regulatory strategies is provided below. State names will not be attached to the regulatory strategies described below because these strategies often overlap within individual state-only programs, and the entire population of states has not been researched or surveyed.[1]

Full Disclosure of All Chemicals Emitted

Some states require sources to report every chemical they emit. The chemicals are automatically added to a guidance list used for permit reviews. Acceptable ambient levels and other emission limitations are determined on a chemical by chemical basis by reviewing available literature. Generally, states with this regulatory scheme are not limited to reviewing specific sources, and can use any available information in their health-based determinations. The chemicals on the guidance list are used for permit reviews. If a source emits more than what is specified on the guidance list, the source must enter negotiations with the state to limit or otherwise abate emissions to the point where human health is not endangered. The permit review process is iterative and flexible in this regulatory scheme, at the discretion of the state. Chemicals and thresholds can be added and modified quickly under this scheme, and without a formal rule revision process.

Agency Discretion for Listing and Threshold Determination – Guidance for Permit Process

This regulatory approach is very similar to the full disclosure scheme, with the exception that sources are not required to report all chemicals emitted. The state determines which chemicals are problematic, usually by an interagency determination between the state's air pollution control agency and state health officials to balance policy needs and likely human health impacts. The burden to determine chemicals of concern falls on the state. The determination process is

[1] States employ a large variety of regulatory schemes. It is important to note that nearly every state employs variations or combinations of the strategies and other factors described in this brief analysis. These generalized regulatory methods represent the DNR's interpretation of technical data and rule information, and should be used for general policy comparisons only.

completely within the state government, and chemicals determined to be risky are added to a guidance list for permitting. If a source emits more than what is specified on the guidance list, the source must enter negotiations with the state to limit or otherwise abate emissions to the point where human health is not endangered. Use of the chemical list in the permitting process is iterative and flexible with significant regulatory discretion. States with this regulatory scheme maintain the flexibility to change listings and thresholds quickly.

Agency Discretion for Listing and Threshold Determination - Rule

Other states have lists and emission standards defined in rules, based on broad authority to protect public health. In this case, the state has the burden to identify and determine chemicals of concern, and it is the state that determines which chemicals are problematic through an interagency determination between the state's air pollution control agency and state health officials. Using this method, the agencies work together to make determinations based on likely health impacts in their state, while balancing political considerations and policy needs. The state proposes additions or modifications to the list spelled out in rule, but must follow a formal rulemaking process. States with this scheme are not tied to specific third party lists, and act on agency discretion when making listing and standard determinations. The State has the flexibility to propose what chemicals should be regulated and to what level, but must go through a formal rulemaking process, which significantly slows down additions and revisions to the regulated list of chemicals.

Third Party Listing and Threshold Determination – Guidance for Permit Process

Some states are linked to specific third party lists to make listings and determinations for their permitting processes. States may modify guidance standards and chemical lists depending upon information provided by third parties. The chemical lists and standards are in a constant state of flux, using the latest information on human health effects of chemicals in the environment. Changes to the list and standards are made by the state without rulemaking procedures according to changes in the third party lists. The guidance list of air toxics and standards is used in the permitting process. If a source emits enough of a chemical to trigger standards in the list, the source must negotiate with the state to eliminate the risk to the public. Chemical determinations and standards are determined by third parties, but the application of the standards in permit processes is flexible, and controlled by the state.

Third Party Listing and Threshold Determination – Rule

Some states, like Wisconsin, are linked to specific third party lists that are frozen in time and spelled out by rule. The state, based on the third party sources, develops a list of chemicals and health based standards that need to be updated. In order to change the list used in permit decisions, the state must go through a formal rule making process. This structure limits state flexibility in chemical identification, listing, and standard determination, and also limits the ability of the state to update the list to reflect current health based standards. Generally, this structure slows the speed at which the state can add or revise state-only air toxics standards, but ensures consistency over time by linking with respected third parties.

Technical State Agency Listing and Threshold Determination

Some states must reach independent scientific toxicology and risk determinations in order to list and regulate air toxics. Under this scheme, state toxicologists reach an independent determination about the toxicity and risks attributable to individual chemicals. Once this determination is made, the state must go through rulemaking procedures to regulate the chemical. This structure, while thorough and theoretically providing the best scientific rationale for regulation, is cumbersome and slow. For each individual chemical, the state must spend

significant resources studying and reaching an independent conclusion. Adding and modifying chemicals under this regulatory structure is very difficult.

Independent Panel List and Threshold Determination

Under this regulatory strategy, the state, concerned citizens, industry groups, or other actors approach an independent air toxics board with requests to regulate chemicals. Entities with standing to approach the board vary by scheme, as does composition of the board. Once concerns or requests reach the board, it conducts an independent analysis of research, and performs original research as necessary to determine if the chemical needs to be listed. Independent boards typically employ toxicologists and scientific experts, and may or may not convene regularly. This regulatory scheme takes the determination and standard setting duties away from the state agency responsible for regulating air toxics. The state may request certain chemicals be regulated, but the board makes the determination and sets the standards based on available literature, independent toxicology data, and scientific expertise. This structure, while very thorough, and scientifically sound, adds an additional step to the listing and standard setting process, and increases the time investment necessary to add or modify regulated air toxics.

Industrial Process/Technology

Some states mirror the federal government's current MACT strategy, but increase the number of chemicals regulated, the applicable sources, and required technologies. The state determines chemicals of concern, associated industrial practices, and best available technologies to control the pollution. As part of an iterative rule making procedure, the state can modify or add requirements. Some states simply require sources to add technologies to emission points where specific classes of air toxics are emitted. This regulatory method avoids the complications of setting health-based standards, while providing some level of pollution abatement.

Geographical

Some states employ a geographical air toxics regulatory approach. The state determines areas of high concentration of dangerous chemicals, and focuses its efforts on those specific areas and chemicals. The state identifies areas and chemicals of concern, and organizes efforts within the community to limit pollution by using incentives and cooperative programs coupled with emission limitations. An independent review board oversees the agency under this mechanism, to ensure proper standard levels and approaches. This method potentially saves state resources by focusing efforts on areas of concern.

Other Factors

In addition to varied regulatory methods, state-only air toxics programs differ in many other significant areas. The level of detail necessary to describe these differences is too great to present in this document, but it must be noted that nearly every state studied has unique policies and standards as a result of political and institutional limitations. Even within similar regulatory schemes, states often have significantly different de minimis levels, regulated sources, number of regulated chemicals (anywhere from 100 up to approximately 2000), data requirements for listing and standard setting, exempt sources, variance procedures, and update procedures. Some states even have the option for a petition system to add, delete, or modify chemicals and standards on the state regulated list. In such instances, the department, or an independent group determines validity of the petition, and makes a listing and standard determination.

Adding to the difficulty of categorizing states is the fact that several states are in the process of developing or updating their rules. The state-only air toxics regulatory environment is dynamic, and can be expected to remain that way.

Wisconsin's Place Within the State-Only Air Toxics Population

As described above, states employ a wide range of regulatory strategies to address the public health concern of air toxics. Within this regulatory universe, the State of Wisconsin's approach falls somewhere in the middle. The DNR does not have the authority to easily modify its list of regulated chemicals and standards, as some states do. The DNR also lacks some of the flexibility available in different regulatory structures. At the same time, the DNR is not saddled with independent determination requirements that slow the regulatory process to a crawl. Another positive is that the DNR does have the ability to regulate chemicals using health-based standards, which protect the citizens of Wisconsin better than some available strategies. Wisconsin sits squarely in the middle of the expanse of regulatory options.